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1987

# Williams v. Harrison : Brief of Appellant

Utah Court of Appeals

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L. Zane Gill, Ann Wise; Biele, Haslam & Hatch; attorneys for appellant.

Robert L. Lord; attorney for respondent.

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870096

IN THE UTAH COURT OF APPEALS

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MICHAEL WILLIAMS,	)	
	)	
Plaintiff and	)	
Respondent,	)	
	)	Utah Court of Appeals
vs.	)	No. 870096-CA
	)	
M. CHRIS HARRISON,	)	
	)	
Defendant and	)	Argument Priority #13.b.
Appellant	)	

---

APPEAL OF A FINAL JUDGMENT BY DEFAULT FROM THE  
FIFTH CIRCUIT COURT, COUNTY OF SALT LAKE,  
STATE OF UTAH

HONORABLE ROBERT C. GIBSON, JUDGE

---

BRIEF OF APPELLANT

---

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L. Zane Gill (3716)  
Ann Wise (5026)  
BIELE, HASLAM & HATCH  
Attorneys for Defendant  
and Appellant  
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Salt Lake City, Utah 84101  
Telephone: (801) 328-1666

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

---

MICHAEL WILLIAMS,	)	
	)	
Plaintiff and	)	
Respondent,	)	
	)	Utah Court of Appeals
vs.	)	No. 870096-CA
	)	
M. CHRIS HARRISON,	)	
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Defendant and	)	Argument Priority #13.b.
Appellant	)	

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APPEAL OF A FINAL JUDGMENT BY DEFAULT FROM THE  
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## STATEMENT OF JURISDICTION

This is an appeal from a final Judgment by Default and from an Order Denying Motion to Set Aside Default Judgment by the Honorable Robert C. Gibson of the Fifth Circuit Court, County of Salt Lake, State of Utah, Salt Lake Department. Jurisdiction is based on Rule 4 of the Rules of the Utah Court of Appeals and Utah Rules of Civil Procedure § 78-4-11.

## ISSUE PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN GRANTING A JUDGMENT BY DEFAULT TO PLAINTIFF AND IN REFUSING TO SET ASIDE SUCH DEFAULT JUDGMENT FOR EXCUSABLE NEGLIGENCE, WHERE DEFENDANT HAD ANSWERED AND DILIGENTLY PURSUED THE MATTER BUT ARRIVED LATE FOR THE TRIAL, AND PLAINTIFF PRESENTED NO EVIDENCE IN SUPPORT OF ANY ALLEGATIONS IN THE UNVERIFIED COMPLAINT.

## RULES

### U.R.C.P. Rule 55(b).

#### **(b) Judgment**

Judgment by default may be entered as follows:

##### (2) By the Court.

In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

##### **(c) Setting Aside Default.**

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

### U.R.C.P. Rule 60(b).

#### **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.**

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

### STATEMENT OF THE CASE

This action began in October of 1984, and involves a dispute over services rendered by Defendant, Mr. Harrison. Mr. Harrison answered Plaintiff's unverified complaint, stated the existence of several meritorious defenses and the parties thereafter engaged in discovery. The documents on file show that Mr. Harrison has diligently sought to pursue his defenses in this matter. Notice of the trial in this matter on January 5, 1987, did not reach Mr. Harrison until the day of trial and then by telephone call from his teenaged daughter.<sup>1</sup> At that time Mr. Harrison was out of town and immediately returned to appear for the trial, but arrived late. The court clerk told Mr. Harrison, as shown by minute entry (see Addendum Exhibit "A"), no default had been entered and that the matter had been continued. Defendant also learned that Plaintiff had appeared, but he had not been prepared with evidence, presented no evidence, and his Motion for Judgment was denied.

On January 26, 1987, a private meeting was held between Plaintiff's counsel and Judge Gibson. Mr. Harrison was unaware

---

1

Mr. Harrison normally receives his mail at a business box number. The notice of trial setting was sent to his home address. Mr. Harrison rarely checks the mail at his home address. His daughter routinely receives the mail at the home address. She failed to recognize the importance of the Notice of Trial Setting and failed to inform Mr. Harrison until the day set for trial.

that this meeting was being held, and notice thereof was never sent to him. At that meeting, Plaintiff's counsel presented and discussed a Memorandum of Law in Support of his Motion for Default Judgment. Mr. Harrison was not provided with a copy and was unaware of the memorandum prior to this meeting. Judge Gibson granted the motion and entered Default Judgment on that date. Addendum Exhibit "B". Thereafter, Mr. Harrison learned of the judgment for the first time when he received a copy of the Notice of Judgment from Plaintiff's counsel.

Mr. Harrison immediately took action to set aside the Default Judgment by filing a motion and affidavit in support pursuant to Utah Rule of Civil Procedure 60(b)(1). Mr. Harrison acted with due diligence in pursuing the matter upon his discovery of this mistake. A hearing was held on Mr. Harrison's Motion to Set Aside the Default Judgment on March 18, 1987. The court found that Mr. Harrison had failed to use due diligence prior to the trial, and that there was no excusable neglect excusing him for failing to appear for the trial. Motion to set Aside was Denied. Addendum Exhibit "C".

#### SUMMARY OF ARGUMENT

U.R.C.P. 60(b)(1) provides that on motion, the court may, in the furtherance of justice, relieve a party from a final judgment for excusable neglect. Utah case law has interpreted this rule liberally to effect the overall goal of affording



litigants their day in court, when it is clear that the claims are in dispute and the Defendant is diligent in pursuing his rights. The interests of justice and fair play place judgments by default in disfavor in our law, particularly under facts and circumstances such as those presented in this case where Plaintiff presented no evidence in support of the claims in his unverified complaint. For these reasons, the circuit court erred in granting a default judgment and in subsequently refusing to set it aside for good cause shown, as provided in U.R.C.P. Rule 55(c).

#### ARGUMENT

##### DEFENDANT'S ACTIONS CONSTITUTE EXCUSABLE NEGLIGENCE

##### UNDER U.R.C.P. 60 (b)(1)

"The uniformly acknowledged policy of the law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party." Interstate Excavating v. Agla Development, 611 P.2d 369 (Utah 1980). For that reason the courts are indulgent towards the setting aside of default judgments where reasonable justification or excuse for the Defendant's failure to appear exists and where timely application to set it aside is made. Where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so. In this way the matter may be resolved in accordance with equity, law and justice.

Interstate Excavating, Id. These principles are particularly applicable to the present case where Plaintiff presented no evidence in support of its case. Therefore, there is no opportunity for serious injustice to be done to Plaintiff by requiring him to present his side of the controversy, at a properly noticed hearing.

The Utah Supreme Court in Interstate Excavating, Id., was dealing with facts similar to ours. Therein, Defendant had answered and asserted various defenses to Plaintiff's claim. Following the withdrawal of Defendant's counsel, a notice of the trial setting was mailed to Defendant, who did not receive it. More favorably for Plaintiff than in our case, however, the Plaintiff therein did present evidence in support of its case before being awarded a default judgment. Nevertheless, the Supreme Court was impressed that immediately upon learning of the judgment, Defendant proceeded diligently with efforts to set it aside and contest the issues on the merits. The Supreme Court reversed the trial court's refusal to set aside the default judgment under U.R.C.P. Rule 60(b), further finding that the interests of justice would be best served thereby. The Supreme Court cited Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962) which also involved the setting aside of a default judgment. Mayhew noted that:

"the court ... should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be

settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside." Id. at 952.

The party's conduct is also an important fact for the court to review when resolving doubts in favor of the party moving to set aside a default judgment. For example, in Helgesen v. Inyangumia, 636 P.2d 1079 (Utah 1981) the Supreme Court found that the lower court had abused its discretion in refusing to set aside a default judgment. The Plaintiff's attorney and Defendant's insurance adjuster had been in frequent contact with each other for months regarding the claims, and Plaintiff knew that Defendant intended to defend the actions, but proceeded to have a default judgment entered without so little as a phone call to the Defendant's adjuster. The court was appalled that Plaintiff did this with full knowledge of the Defendant's position and did not have the courtesy to contact and make an inquiry. The court concluded that Defendant was not guilty of lack of diligence and that his actions constituted a mistake and excusable neglect under U.R.C.P. Rule 60(b). The court found this to be a case

where the strict procedural rules "must yield to a more basic rule of fundamental fairness." Id. at 1082.

A question over the mailing of notices was at issue in May v. Thompson, 677 P.2d 1109 (Utah 1984), wherein the Supreme Court again found the trial court's decision to be arbitrary and vacated a default judgment. The rule of balancing equities, the hardship to the Defendant, and the need to serve the ends of justice were cited as reasons for the court's decision.

THE INTERESTS OF JUSTICE AND FAIR PLAY  
REQUIRE THAT THE JUDGMENT BE SET ASIDE

Judgments by default are not favored by the courts, nor are they in the interests of justice and fair play. Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962). Those interests have been particularly harmed here, where no evidence was presented in support of Plaintiff's claim, vigorously contested by Mr. Harrison. Fair play apparently was forgotten when the lower court, initially hesitating to grant judgment based on no supporting evidence, then granted judgment pursuant to arguments presented by Plaintiff's counsel in a private meeting with the judge. Mr. Harrison was given no notice of this meeting and was provided no advance copy of such memorandum. There was no opportunity for his arguments to be heard in opposition to Plaintiff's memorandum. The unfairness of this is emphasized by

the inapplicability of the one out of state case relied upon by Plaintiff's counsel in support of his contention that a default could be entered without proving Plaintiff's case.

First, Plaintiff admitted in his memorandum that there are no Utah cases in support of his motion and that various courts had held to the contrary. Second, the one Montana case relied upon by Plaintiff, Archer v. La March Creek Ranch, 571 P.2d 379 (MT 1977) is easily distinguishable. In Archer, the defaulted corporate Defendant did not attempt to attend the trial and apparently there was no reasonable explanation given for such failure to appear. Excusable neglect was not at issue. However, at trial both oral and documentary evidence was introduced by another party in support of the same affirmative defenses raised by the corporation. Reviewing each of those defenses, the court found that the burden of proof had not been carried.

The Utah rule was well stated in Heathman, supra at 190, where Plaintiff complained of the court's setting aside of his default against Defendant based on Defendant's excusable neglect under U.R.C.P. Rules 55(c) and 60(b). The court indicated once again the strong jurisprudential disfavor towards judgments by default:

"No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts, in the interest of justice and fair play, favor, where possible, a full and

complete opportunity for a hearing on the merits of every case."

GOOD CAUSE EXISTS UNDER U.R.C.P. RULE 55  
TO SET ASIDE THE DEFAULT JUDGMENT

U.R.C.P. Rule 55(c) provides that for good cause shown the court may set aside an entry of default. The facts of this case do present sufficient good cause justifying the setting aside of the default judgment and the lower court erred in refusing to do so.

In Russell v. Martell, 681 P.2d 1193 (Utah 1984), the Utah Supreme Court reversed a default judgment, due to the trial court's failure to follow the strict guidelines of U.R.C.P. Rule 55(b)(2) prescribing the procedures to be followed by trial courts in entertaining judgments against defaulting parties. "Courts are not at liberty to deviate from those rules [governing default judgments] just because one party is in default and is not entitled to be heard on the merits of the case." Russell, Id. at 1195. Therein, the court had a much less sympathetic Defendant, inasmuch as Defendant filed no answer and had stated with indifference that he felt no legal obligation to respond to Plaintiff's claims. Those statements negated, in the court's opinion, the requisite diligence in actively defending against

Plaintiff's claims. Mr. Harrison's actions, in sharp contrast, show his diligence in actively defending against Plaintiff's claims. Under these circumstances, he should not be punished with a default judgment brought about by one, inadvertent, excusable mistake.

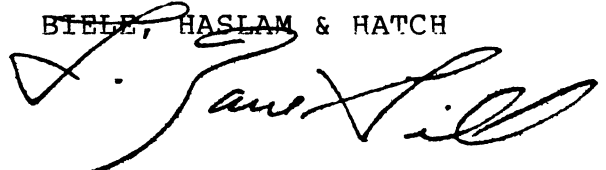
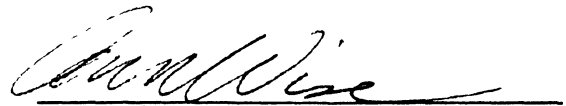
Under U.R.C.P. Rule 55(b)(2), it was also necessary for the court to determine the amount of damages and establish the truth of the averments in the complaint by the taking of evidence at the hearing. Failure to do so constitutes additional good cause for setting aside the entry of default.

#### CONCLUSION

Based upon the Utah jurisprudence disfavoring judgments by default and favoring a hearing on the merits in contested matters, Defendant - Appellant urges this Court to reverse the circuit court's Judgment by Default and to set aside such default judgment on the grounds of excusable neglect under U.R.C.P. Rule 60(b)(1).

Respectfully submitted this 26th day of May, 1987.

BIELE, HASLAM & HATCH

  
\_\_\_\_\_  
L. Zane Gill  
\_\_\_\_\_  
Ann Wise  
Attorneys for Defendant  
and Appellant

## **ADDENDUM**



D O C K E T

FIFTH CIRCUIT COURT - SLC Page 1  
WEDNESDAY JANUARY 7, 1987  
9:48 AM  
Case.....: 845102950 CV Civil Filing Date: 11/01/84  
Case Title:  
WILLIAMS MICHAEL VS HARRISON M CHRIS

-----  
Cause of Action:

Amount of Suit.: \$ .00  
Return Date.....  
Judgment.....: Date: Amt: \$ .00  
Disposition.....: Date:

-----  
Court Set: TRIAL on 01/05/87 at 0930 A in room ? with RCG

-----  
No Tracking Activity.

-----  
No Accounts Payable Activity.

-----  
Party...: PLA Plaintiff  
Name....:

WILLIAMS MICHAEL  
Home Phone.: ( ) Work Phone.: ( ) -

-----  
Party...: DEF Defendant  
Name....:

HARRISON M CHRIS  
Home Phone.: ( ) - Work Phone.: ( ) -

-----  
02/25/86 Case converted from SLC system... Civil file date 11/01/84. SLC  
I 10/17/86 FILED NOTICE OF WITHDRAWAL OF COUNSEL (DEFENDANT) MRS  
I 10/27/86 FILED NOTICE TO APPEAR IN PERSON OR APPOINT OTHER COUNSEL MRS  
I 11/05/86 FILED REQUEST FOR TRIAL SETTING NMD  
11/18/86 TRL scheduled for 1/ 5/87 at 9:30 A in room ? with RCG NMD  
01/05/87 GIBSON/CKO T870002 C44 PLAINTIFF PRESENT THRU ATTY ROBERT LORD. CKO  
DEFENDANT NOT PRESENT. PLAINTIFF NOT PREPARED WITH EVIDENCE. CKO  
I PLAINTIFFS ATTY MOTION FOR JUDGMENT C/O MOTION DENIED CKO

End of the docket report for this case.

EXHIBIT     A

ROBERT L. LORD  
Utah State Bar No. 1994  
Attorney for Plaintiff  
444 Metropolitan Law Building  
431 South 300 East  
Salt Lake City, Utah 84111  
Telephone: 328-4241

**IN THE FIFTH CIRCUIT COURT, COUNTY OF SALT LAKE**

**STATE OF UTAH, SALT LAKE DEPARTMENT**

—ooo0ooo—

MICHAEL WILLIAMS,	)	
...	)	<b>JUDGMENT BY DEFAULT</b>
Plaintiff,	)	
vs.	)	Civil No. 84-CV-10295
M. CHRIS HARRISON,	)	
...	)	
Defendant.	)	

—ooo0ooo—

The above entitled matter came on regularly for trial before the undersigned, one of the judges of the above entitled court, on the 5th day of January, 1987, at the hour of 9:30 a.m. Plaintiff appeared by and through his attorney, Robert L. Lord. No one appeared on behalf of the defendant, whereupon counsel for the plaintiff moved for judgment pursuant to the prayer of the complaint on file herein.

The Court, having considered the motion of the plaintiff, together with the memorandum in support thereof, having examined the files and records herein, being fully advised in the premises, and good cause appearing, hereby finds that the plaintiff is entitled to a return of the \$2,100 advance fees paid to the defendant for failure of the defendant to provide services as agreed.


**WHEREFORE**, by virtue of the law, and by reason of the premises aforesaid, it is **ORDERED, ADJUDGED AND DECREED** that said plaintiff do have and recover from the defendant, the sum of \$2,100, interest thereon at the rate of 10% per annum from December 15, 1983, in the sum of \$647.50, together with plaintiff's costs and disbursement incurred in this action amounting to the sum

EXHIBIT B

of \$30.00, making a total judgment of \$2,777.50, all to bear interest at the rate of 12% per annum from the date hereof till paid.

DATED this 26 day of January 1987.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Robert C. Gibson", is written over a horizontal line.

Robert C. Gibson  
Circuit Court Judge

FILED

MAR 23 1987

ROBERT L. LORD  
Utah State Bar No. 1994  
Attorney for Plaintiff  
444 Metropolitan Law Building  
431 South 300 East  
Salt Lake City, Utah 84111  
Telephone: 328-4241

BIELE, HASLAM & HATCH

IN THE FIFTH CIRCUIT COURT, COUNTY OF SALT LAKE

STATE OF UTAH, SALT LAKE DEPARTMENT

---0000000---

MICHAEL WILLIAMS,	)	
	)	
... Plaintiff,	)	ORDER DENYING
	)	MOTION TO SET ASIDE
vs.	)	DEFAULT JUDGMENT
	)	
M. CHRIS HARRISON,	)	Civil No. 84-CV-10295
	)	
... Defendant.	)	

---0000000---

The defendant's motion to set aside default judgment came on regularly for hearing before the undersigned, one of the judges of the above entitled court, on the 18th day of March, 1987. Plaintiff was represented by his attorney, Robert L. Lord. Defendant was present in court and represented by his attorney, L. Zane Gill.

The Court, having reviewed the files and records herein, having weighed and considered the affidavits submitted in support and opposition to the motion together with the representations and arguments of counsel, finding that the defendant had failed to use due diligence prior to the trial, and that there was no excusable neglect excusing him for failing to appear for the trial, it is hereby **ORDERED** that the defendant's motion be, and the same hereby is, denied.

DATED this        day of March 1987.

BY THE COURT:

/\_\_\_\_\_  
Robert C. Gibson  
Circuit Court Judge

**CERTIFICATE OF MAILING**


I hereby certify that I mailed a copy of the foregoing, postage prepaid, this date of March 20, 1987, to L. Zane Gill, attorney for defendant, 50 West Broadway, 4th Floor, Salt Lake City, Utah 84101.

161  
Carol J. Lord - Secretary

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the above and foregoing **BRIEF OF APPELLANT**, by placing the same in the U.S. mail, postage prepaid, on this 26th day of May, 1987, addressed as follows:

Robert L. Lord  
Attorney for Plaintiff  
and Respondent  
444 Metropolitan Law Building  
431 South 300 East  
Salt Lake City, UT 84111

  
Ann Wise